

CAN YOUR HOUSING COMMUNITY EXCLUDE FAMILIES WITH CHILDREN? IT DEPENDS!

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Background ⁱ

In 1968, Congress enacted the Fair Housing Act (FHA) to prohibit home sellers and landlords from discriminating on the basis of race, religion, or national origin. Gender was added as a protected class in 1974. In 1988, Congress enacted the Fair Housing Amendments Act of 1988 (FHAA), which prohibited housing discrimination on the basis of disability and familial status (the presence of children under 18 in the household). At the same time Congress added an exemption for "senior" housing communities. Under the FHAA, a housing community/facility could discriminate on the basis of familial status if (1) 80% of the dwellings were occupied by at least one person age 55 or older and the community provided "significant services and facilities" for older persons; or if (2) the housing community was reserved exclusively (100%) for persons age 62 or older.

The "significant services and facilities" requirement sparked controversy and litigation in the years following the FHAA's enactment in 1988. Subsequently, Congress enacted the Housing for Older Persons Act (HOPA) and eliminated the "significant facilities and services" requirement. HOPA was signed into law on December 28, 1995. Under the current version of the FHA, as amended by HOPA, a community can qualify for the housing-for-older-persons exemption, and refuse to rent or sell to families with children, provided that three requirements are met.

Requirements

In order to qualify for the housing for older persons exemption, the housing community/facility must satisfy each of the following requirements:

- At least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
- The owner or management of the housing facility/community must publish and adhere to policies and procedures that demonstrate an intent to operate as 55 or older housing; and
- The facility/community complies with rules issued by the HUD Secretary for verification of occupancy through reliable surveys and affidavits.

When calculating the 80% occupancy requirement, housing providers do not need to include units occupied by employees of the housing community under 55 years of age, unoccupied units, and units that have been continuously occupied by the same household since September 13, 1988, that do not contain at least one person over the age of 55.

Once 80% of the units are occupied by at least one person 55 or older, persons under the age of 55 may occupy the remaining 20% of units. Housing communities had a transition period, from May 3, 1999 to May 3, 2000, to meet the 80% rule. If an existing community did not meet the 80% by May 3, 2000, it does not qualify for the exemption

and is not presently considered a 55 or older housing community.

HOPA requires that a housing facility/community compile a list of occupants and verify the ages of the occupants. A procedure for age verification should be developed and followed. A variety of documents are considered reliable as age verification documentation, including a birth certificate, a driver's license or a passport. The community should re-survey its lists of residents every two years to ensure that the 80% requirement is met. A community's failure to survey, or re-survey residents, in accordance with its age verification procedures could jeopardize the community's status as 55 or older housing. The housing community/facility would be required to produce these occupancy/age verification surveys if a discrimination complaint was filed, alleging, for example, that families with children were barred from renting.

Regarding the intent requirement, the following factors, among others, are relevant:

- How do you describe the housing facility/community to prospective residents? It must be described and designated as an age 55 or older housing community, i.e., "Pleasantville Homeowners Association -- An Age 55 or Older Housing Community."
- How do you describe your property in advertising designed to attract prospective residents? For example, in a newly constructed community in Redmond, Washington, the following statement appears in the advertising, "Pursuant to the Fair Housing Act, [name of Community] is intended for occupancy by at least one person age 55 years of age or older per unit. No person in permanent residence under 18 years of age is permitted." ⁱⁱ The use of phrases such as "adult living" or "adult community" are not enough to show the intent to operate as 55 or older housing.
- Do your lease provisions, rental agreements, rules, regulations, covenants, and/or deeds indicate that the community is 55 or older housing? The following statement should be inserted in agreements and rules: "Pleasantville Homeowners Association is an Age 55 or Older Housing Community under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended 42 U.S.C. 3601-3619) and the Housing for Older Persons Act of 1995 (Rule.L. 104-76, 109 Stat.787)."
- Do you maintain and consistently apply procedures used for verifying age and occupancy?
- Do you publicly post in common areas statements describing the facility/community as housing for persons 55 years of age or older?

Dealing with Discrimination Claims

If a complaint alleging familial status discrimination is filed with the Washington State Human Rights Commission (WSHRC), the WSHRC will look at whether the housing community/facility has a valid exemption, under HOPA, from renting/selling to families with children. The WSHRC will determine if the housing community has met the 80% occupancy rule by examining current age verification surveys. The WSHRC will also ask the housing community for documentation, as described above, supporting the community's contention that it intends to operate as 55 or older housing. The housing

provider has the burden of proving that it was in compliance with HOPA requirements on the date of the alleged act of discrimination. If evidence is supplied that demonstrates that the occupancy and intent requirements have been met, then the exemption will be most likely supported, and the discrimination claim will fail.

ⁱ Background text excerpted from Taylor v. Rancho Santa Barbara, 206 F. 3d 932 (9th Cir. 2000); decision authored by Circuit Judge Alfred T. Goodwin.

ⁱⁱ Sample language under the "1999 Federal Rules Implementing Age 55 or Older Housing," by John E. Woodring. MHCW Bulletin, Volume V. Number 2, Printed 5/99.

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